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**THE SUPREME COURT OF FLORIDA**

THE ESTATE OF ELLEN LUCILLE SMITH A/K/A ELLEN L. SMITH, by and through ROXANNE HORN, Personal Representative,

Petitioner,

v.

SOUTHLAND SUITES OF ORMOND BEACH, LLC; *et al.*,

Respondents.

Case No.: SC 10-631
Fifth DCA Case No.: 5D08-3383
L.T. Case No.: 2007 33166 Div. 31

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

This case presents an issue of statewide concern impacting a protected class of persons; namely, elderly, assisted living and nursing home residents. The issue concerns the proper interpretation of a power of attorney. Specifically, whether a power of attorney should be strictly construed and be held to grant only those powers that are specified.

The resolution of this issue by a panel of the Fifth District Court of Appeal in the instant case is in express and direct conflict with the decisions from the Fifth District and other District Courts on this point.

Petitioner, the Estate of Ellen Lucille Smith, by and through Roxanne Horn, Personal Representative, shall be referred to as the "Estate." Ellen Lucille Smith shall be referred to as "Ms. Smith." The Personal Representative shall be referred to as "Ms. Horn." The Respondents shall be collectively referred to as "Southland" or "Respondents."

In accordance with Rule 9.120(f) of the Florida Rules of Appellate Procedure, the Appendix to this Brief contains a copy of the Fifth District's decision and other relevant portions of the record. References to the Appendix shall be cited as "(Tab ___, p.___)."

## STATEMENT OF JURISDICTION

This Court accepted jurisdiction of this matter for discretionary review of the opinion of the Fifth District Court of Appeal in Case No. 5D08-3383 in *Estate of Smith v. Southland Suites of Ormond Beach, LLC*, 28 So. 3d 103 (Fla. 5th DCA 2010), rehearing denied Feb. 24, 2010, (the "*Smith* Opinion" or "*Smith*"). (Tab 20). The Florida Constitution grants this Court discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of another district court. Art. V, §3(b)(3), Fla. Const. (1980).

The Estate seeks review of the decision based on the Fifth District's express and direct conflict with the Fifth District's decisions in *Him v. Firstbank Florida*, 89 So. 3d 1126 (Fla. 5th DCA 2012); *Dingle v. Prikhdina*, 59 So. 3d 326 (Fla. 5th DCA 2011); and *James v. James*, 843 So. 2d 304 (Fla. 5th DCA 2003); the Fourth District's decisions in *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005); and *Regency Island Dunes, Inc. v. Foley & Assocs. Constr. Co.*, 697 So. 2d 217 (Fla. 4th DCA 1997); the Third District's decisions in *Bloom v. Weiser*, 348 So. 2d 651 (Fla. 3d DCA 1977); and *Karlen v. Gulf & Western Industries, Inc.*, 336 So. 2d 461 (Fla. 3d DCA 1976); the Second District's decisions in *Emeritus Corp. v. Pasquariello*, 95 So. 3d 1009 (Fla. 2d DCA 2012); *Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.L.C.*, 66 So. 3d 396 (Fla. 2d DCA 2011); *Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito*,

19 So. 3d 340 (Fla. 2d DCA 2009); *In re Estate of McKibbin*, 977 So. 2d 612 (Fla. 2d DCA 2008); *Vaughn v. Batchelder*, 633 So. 2d 526 (Fla. 2d DCA 1994); *Kotsch v. Kotsch*, 608 So. 2d 879 (Fla. 2d DCA 1992); and *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So. 2d 100 (Fla. 2d DCA 1992); and the First District's decisions in *In re Estate of Bell v. Johnson*, 573 So. 2d 57 (Fla. 1st DCA 1990); and *Krevatas v. Wright*, 518 So. 2d 435 (Fla. 1st DCA 1988), as well as with other decisions cited throughout this brief.

Moreover, the Fifth District misapplied decisional law. Misapplication of decisional law serves as a basis for conflict jurisdiction. *See Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 87 (Fla. 2005) (misapplication of decisional law of Supreme Court is basis for conflict jurisdiction); *Spivey v. Battaglia*, 258 So. 2d 815, 816 (Fla. 1972) (misapplication of decisional law of another district is basis for conflict jurisdiction).

## STANDARD OF REVIEW

The interpretation of a power of attorney is a question of law, reviewed *de novo*. *Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.*, 66 So. 3d 396, 398 (Fla. 2d DCA 2011). Issues involving the interpretation of a statute are also reviewed *de novo*. *Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 373 (Fla. 2008).

## STATEMENT OF THE CASE AND FACTS

Ms. Smith was a frail, elderly Florida citizen, who suffered from the infirmities of aging and who in 2005, became no longer able to care for herself, such that she required assistance with all activities of daily living. Accordingly, Ms. Smith was admitted to Southland's Assisted Living Facility ("ALF") on November 7, 2005, where she remained in primary residence until her discharge on June 29, 2006. (Tab 1, p. 2, ¶ 2).

During her residency, Ms. Smith suffered from multiple unexplained falls, one resulting in serious injury to her left shoulder. (Tab 1, p. 9, ¶ 49). Ms. Smith was taken to the hospital via ambulance, where she was treated for hip pain-contusion and was diagnosed with a neck and hip fracture. (Tab 1, p. 9, ¶¶ 48, 49). As a result of her injuries, Ms. Smith passed away on August 1, 2006. (Tab 1, pp. 10-13).

On or about December 12, 2007, the Estate filed suit against Southland, alleging negligence and violations of Ms. Smith's ALF Resident's Rights pursuant to section 400.429 of the Florida Statutes. (Tab 1). In response to the Complaint, Southland filed ten separate motions to compel binding arbitration and to stay proceedings, one for each of the named Defendants (the "Compel Motions"), contending that Ms. Horn executed a valid and binding arbitration agreement on behalf of Ms. Smith as part of the admissions process as Southland. (Tab 2-11). A

hearing was held on July 8, 2008, on Southland's Compel Motions before the Honorable Richard S. Graham. (Tab 13).

At the hearing, the Estate asserted that Southland failed to meet its burden in establishing that Ms. Horn, as Ms. Smith's agent, had authority to bind Ms. Smith to the arbitration agreement. (Tab 13, pp. 10:14 – 13:23). Specifically, the Estate contended that the language of the instant durable family power of attorney ("POA") must be strictly construed and that the "broad provision…is not sufficient" to grant Ms. Horn authority to waive Ms. Smith's constitutional rights of access to courts and trial by jury.[1] (Tab 13, pp. 10:14-13:23).

The instant POA contains nine specific grants of authority over Ms. Smith's tangible and intangible *property rights*, including the rights:

- to "any and all sums of money or payments due or to become due to me; (Tab 14, Ex. A. p. 1, line 4)
- to deposit in my name in any banks . . . any and all monies collected or received; (Tab 14, Ex. A. p. 1, lines 4-5)
- to pay any and all bills; (Tab 14, Ex. A. p. 1, line 6)
- to draw checks or drafts upon any and all bank accounts; (Tab 14, Ex. A. p. 1, line 7)
- to enter any safe deposit box . . . and to remove any cash,

[1] Although Southland did not attach the *Smith* POA to its Compel Motions, the parties stipulated that the POA presented at the July 8, 2008 hearing would become an attachment to the Compel Motions. (Tab 13, pp. 13:24 – 15:25). The *Smith* POA was subsequently filed with the trial court on July 17, 2008. (Tab 14, Ex. A).

documents or other property located therein; (Tab 14, Ex. A. p. 1, lines 7-10)

- to sell or dispose of . . . any stock . . . or shares in a mutual fund; (Tab 14, Ex. A. p. 1, lines 10-13)

- to receive the consideration money for the sale thereof; (Tab 14, Ex. A. p. 1, lines 13-14)

- to execute such transfers or assignments as shall be necessary to assign my said shares, bonds, or securities; (Tab 14, Ex. A. p. 1, lines 14-16);

- to sell and convey any and all land owned by me; (Tab 14, Ex. A. p. 1, lines 16-17).

The nine specific grants are followed by the ensuing broad provision:

> [A]nd generally to do and perform all matters and things, transact all business, make, execute, and acknowledge all contracts, whether involving real property or not, orders, deeds, writings, assurances, and instruments which may be requisite or proper to effectuate any matter or thing appertaining or belonging to me, and generally to act for me in all matters affecting my business or property, including all power provided pursuant to Florida Statutes Section 709.08, and other Florida Statutes with the same force and effect to all intents and purposes as though I were personally present and acting for myself, hereby ratifying and confirming whatsoever my said attorney shall do by authority hereof.

(Tab 14, Ex. A, p. 1, lines 17-24).

The trial court acknowledged that the POA was a "very general and broad durable power of attorney[.]" (Tab 13, p. 16:2-3). The trial court further stated that it was "inclin[ed] [] to deny the motion to compel" but granted Southland ten days

to find authority to support Southland's statement that "a broad-sweeping power of attorney" could entitle "Ms. Horn to enter into [the] arbitration agreement on behalf of her mother." (Tab 13, pp. 23:16-24, 24:22 – 25:8). On July 17, 2008, Southland filed a response with the trial court claiming that, although the POA did not explicitly state that Ms. Horn had the authority to bind Ms. Smith to arbitration, under the Fifth District's decision in *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983), the POA "nevertheless gave Ms. Horn that authority."[2] (Tab 14, p. 2). On August 25, 2008, the trial court, citing *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263, 269 (Fla. 4th DCA 2006) (*quoting Estate of Schriver*, 441 So. 2d 1105), granted the Compel Motions finding that the instant POA gave Ms. Horn "broad authority" to consent to arbitration on behalf of Ms. Smith. (Tab 15, p. 2).

The Estate filed a timely appeal to the Fifth District, asserting that the trial court erred and the order must be reversed because the broad and specific provisions in the instant POA were insufficient to confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights, since a power of attorney must be strictly construed and will be held to grant only those powers that are specified. (Tabs 16; 17; 19; 21).

[2] Southland also attached to its July 17, 2008 filing the powers of attorney at issue in *In re Estate of McKibbin*, 977 So. 2d 612 (Fla. 2d DCA 2008) (finding power of attorney insufficient to confer authority upon agent to consent to arbitration); and *Woebse v. Health Care Retirement Corp. of America*, 977 So. 2d 630 (Fla. 2d DCA 2008) (reviewing unconscionability order, as authority was not at issue). (Tab 14, Ex. B, Ex. C).

On January 8, 2010, the Fifth District rendered its opinion in *Smith* affirming the trial court's order granting the Compel Motions. (Tab 20). The *Smith* Panel acknowledged that the POA "did not specifically reference arbitration agreements, but gave Smith's daughter broad authority to effectuate Smith's legal rights." (Tab 20, p. 2). In so holding, the *Smith* Panel relied on the broad provision following the nine specific grants in the POA, stating that the POA's language "is clearly broad enough to encompass arbitration[.]" (Tab 20, p. 2). The Fifth District denied the Estate's motions for rehearing, rehearing *en banc*, and certification. (Tabs 21-22). The Estate timely noticed the matter for discretionary conflict review by this Court, and this Court accepted jurisdiction on January 16, 2014. (Tabs 23-24).

## SUMMARY OF THE ARGUMENT

Florida law is clear that powers of attorney are to be strictly construed and that only powers expressly set forth in the power of attorney will support a finding of authority. All provisions of the power of attorney must be considered in *pari materia* to ascertain the intent of the principal, and to give reasonable effect to its provisions. Construing the instant POA strictly and carefully, the *Smith* Panel should have concluded that the instant POA did not authorize Ms. Horn to waive Ms. Smith's constitutional right of access to the courts, trial by jury, and due process.

In addition, the *Smith* Panel's opinion directly conflicts with the language of

Florida's power of attorney statute, which states that an agent only has authority to perform, without prior court approval, only those acts that are specifically enumerated in the power of attorney. The Florida Legislature enacted the power of attorney statute in order to protect and aid disabled and incapacitated Floridians in the handling of their affairs. The *Smith* Panel's interpretation of the instant POA has the opposite effect of that which the Legislature sought to accomplish.

Accordingly, the Estate requests that this Court find that the instant POA does not confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights, reverse *Smith*, and remand the matter to the trial court with instructions to deny the Compel Motions.

## ARGUMENT

When seeking to compel arbitration, the movant bears the burden of establishing that an enforceable written agreement to arbitrate exists between the parties. *Shearson, Lehman, Hutton, Inc. v. Lifshutz*, 595 So. 2d 996, 997 (Fla. 4th DCA 1992); *see also*, *Liberty Communications, Inc. v. MCI Telecomms. Corp.*, 733 So. 2d 571, 574 (Fla. 5th DCA 1999) (stating that the general rule of construction of arbitration provisions in favor of arbitrability presupposes the existence of an enforceable arbitration agreement between the parties).

Arbitration provisions are personal covenants and will bind only the parties to the covenants. *Regency Island Dunes, Inc. v. Foley & Associates Construction*

*Co. Inc.*, 697 So. 2d 217, 218 (Fla. 4th DCA 1997). Therefore, anyone who has not agreed whether expressly or implicitly to be bound by an arbitration agreement cannot be compelled to arbitrate. *Karlen v. Gulf & Western Indus., Inc.*, 336 So. 2d 461, 462 (Fla. 3d DCA 1976). Further, waivers of constitutional rights such as access to the courts and trial by jury must be knowing and voluntary. *De Jesus v. State*, 848 So. 2d 1276, 1277 (Fla. 2d DCA 2003).

This Court has held that "there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid agreement to arbitrate exists; (2) whether an arbitration issue exists; and (3) whether the right to arbitration has been waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). The issue of Ms. Horn's purported authority to bind Ms. Smith to arbitration, falls under the first prong.

## I. The Proper Interpretation of a Power of Attorney

Construction of a power of attorney is governed by contract law. *James v. James*, 843 So. 2d 304, 308 (Fla. 5th DCA 2003). Florida district courts, including the Fifth District very recently in *Him v. Firstbank Florida*, 89 So. 3d 1126, 1127 (Fla. 5th DCA 2012), have repeatedly acknowledged that powers of attorney are to be strictly construed. *Dingle v. Prikhdina*, 59 So. 3d 326, 328 (Fla. 5th DCA 2011); *Three Key, Ltd. v. Kennedy Funding, Inc.*, 28 So. 3d 894, 903-04 (Fla. 5th DCA 2009); *James v. James*, 843 So. 2d 304, 308 (Fla. 5th DCA 2003); *Krevatas*

*v. Wright*, 518 So. 2d 435, 436-37 (Fla. 1st DCA 1988); *In re Estate of Bell*, 573 So. 2d 57, 59 (Fla. 1st DCA 1990); *Vaughn v. Batchelder*, 633 So. 2d 526, 528 (Fla. 2d DCA 1994); *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So. 2d 100, 102 (Fla. 2d DCA 1992) (J. Altenbernd, concurring); *Bloom v. Weiser*, 348 So. 2d 651, 653 (Fla. 3d DCA 1977); and *Alterra Healthcare Corporation v. Bryant*, 937 So. 2d 263, 269 (Fla. 4th DCA 2006).

Powers of attorney will be held to grant only those powers that are specified and should be closely examined in order to ascertain the intent of the principal. *Kotsch*, 608 So. 2d at 880; *Falls at Naples*, 603 So. 2d at 102; *Him*, 89 So. 3d at 1127; *Dingle*, 59 So. 3d at 328; *Krevatas*, 518 So. 2d at 437; *Bloom*, 348 So. 2d at 653; *Vaughn*, 633 So. 2d at 528; *Bell*, 573 So. 2d at 59; *Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito*, 19 So. 3d 340, 341 (Fla. 2d DCA 2009); *In re Estate of McKibbin*, 977 So. 2d 612, 613 (Fla. 2d DCA 2008). In addition, powers of attorney should be interpreted to protect the legal rights of the principal. *Vaughn*, 633 So. 2d at 528-29; *Kotsch*, 608 So. 2d at 880-81.

In *Falls at Naples*, Judge Altenbernd explained that notwithstanding a broad provision in the power of attorney, the absence of an express grant meant that the

power of attorney had to be strictly construed as not authorizing the agent to act. *Falls at Naples*, 603 So. 2d at 102.[3] Judge Altenbernd stated:

> These documents appoint Mr. Levine as 'attorney ... to do any and all acts that he, in his sole discretion, shall deem necessary or prudent with regards to the acquisition of the property ... including but not limited to executing any document or instrument affecting the interest in said property ... .' While the documents give Mr. Levine broad powers to do every act 'necessary to be done in and about the premises,' **they contain no language <u>expressly authorizing</u> him to borrow money on the credit of the individual partners or to execute personal guarantees on their behalf**.

*Id*. (emphasis added).

A power of attorney may grant specific powers and it may contain a "catch-all" provision that broadly describes the authority granted to the agent. *See*, *e.g.*, *Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.*, 66 So. 3d 396, 399 (Fla. 2d DCA 2011); *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033, 1034 (Fla. 2d DCA 2009). If a power of attorney includes both types of provisions, "the nature of listed specific powers may clarify whether the broader catch-all provision includes a particular, but not specifically mentioned, power." *Estate of Irons*, 66 So. 3d at 399.

However, under no circumstances should a broad catch-all provision be interpreted in a way as to render the specific powers meaningless. *See James*, 843

[3] *Kotsch* cited as authority Judge Altenberd's concurrence in *Falls at Naples* making it binding law in the Second District. *Kotsch*, 608 So. 2d at 880.

So. 2d at 308 (finding that if a broad general provision was construed to grant the holder unbridled power, "there would be no meaning left for [the specific power], or area for its operation."); *see also Emeritus Corp. v. Pasquariello*, 95 So. 3d 1009, 1012 (Fla. 2d DCA 2012) (stating "[t]o determine the scope of the power of attorney, we must examine the language of any catch-all provisions and the relationship of that language to the types of interests over which the power of attorney specifically grants authority.") This is because under the rules governing contract interpretation, "an interpretation which gives reasonable meaning to all the provisions of a contract is preferred to one which leaves part useless or inexplicable." *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994) (*citing First Nat'l Bank v. Savannah, F. & W. Ry. Co.*, 18 So. 345, 348 (Fla. 1895); *Curtiss–Wright Corp. v. Exhaust Parts, Inc.*, 144 So. 2d 822, 823-24 (Fla. 3d DCA 1962)).

The general broad grants within powers of attorney that also contain specific grants are not unlike the Necessary and Proper Clause in the United States Constitution. U.S.C.A. Const. Art. I § 8, cl. 18. The United States Supreme Court has held that the Necessary and Proper Clause "is not itself a grant of power," but a declaration that "Congress possesses all of the means necessary to carry out [its] specifically granted [] powers[.]" *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 247 (1960). Similarly, the general broad grants within powers of attorney should

be viewed as granting authority to perform acts which would be necessary to carry out the specific grants.

Lastly, if a power of attorney merely provides a broad general grant of authority without identifying any specific grants of authority, "such as provisions purporting to give the agent authority to do all acts that the principal can do," the power of attorney fails to grant any authority to the agent since the broad general grant fails to express any specific grants of authority. § 709.2201(1), Fla. Stat. (2011), *cf.* § 709.08(7)(a), Fla. Stat. (1998) (repealed and replaced by § 709.2101, Fla. Stat. (2011), *et seq*.); *see also, Estate of Irons*, 66 So. 3d at 398-99 (citing § 709.08(6) – (7) and finding that "[t]he qualifying phrase, '[u]nless otherwise stated,' reminds us of our obligation to construe strictly the language of the POA."); *Bell*, 573 So. 2d at 59; *Falls at Naples*, 603 So. 2d at 102; *Dingle*, 59 So. 3d at 328; *James*, 843 So. 2d at 308.

While the above interpretation principles are straightforward, the opinions from the District Courts of Appeal on the proper scope of authority of powers of attorney fail to maintain uniformity. As detailed below, this failure is attributable to the District Courts' disregard for the various types of provisions within powers of attorney, along with their failure to abide by controlling precedent.

### *A. Categories of Powers of Attorney and the Resulting Case Law*

A survey of Florida's case law on the scope of authority granted by powers of attorney brings to light generally four categories of powers of attorney. The first category contains powers of attorney that only consist of specific grants. *See*, *e.g.*, *Bell*, 573 So. 2d at 59 (finding no authority to gift, absent specific grant); *Krevatas*, 518 So. 2d at 437 (same); *Vaughn*, 633 So. 2d at 527 (same); *Kotsch*, 608 So. 2d at 880 (same); *Dingle*, 59 So. 3d at 328 (same); *Estate of Irons*, 66 So. 3d at 400 (finding specific grants did not confer authority to consent to arbitration); and *Estate of Milo*, 19 So. 3d at 341-42 (same). *See also*, *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301 (Fla. 4th DCA 2005) (determining health care proxy lacked authority to consent to arbitration). In the preceding cases, the District Courts strictly construed the powers of attorney and properly found that any authority to act must have been specifically stated therein.

A second category consists of powers of attorney that include specific grants along with a broad grant that, by its own terms, is limited to the specific grants. *See*, *e.g.*, *Estate of McKibbin*, 977 So. 2d at 613 (holding no authority granted to consent to arbitration and finding the broad catch-all was limited to "in and about these premises" i.e., the specific grants); *Falls at Naples*, 603 So. 2d at 101 (highlighting that the broad grant was limited by the language "necessary to be done in and about the premises"); *Bloom*, 348 So. 2d at 653 (same); *James*, 843 So.

2d at 306 (same); *Him*, 89 So. 2d at 1127-28 (same); *Emeritus Corp.*, 95 So. 3d at 1012 (finding specific power "to submit to arbitration" along with broad catch-all tailored to specific grants, conferred power upon agent to consent to arbitration); *Candansk, LLC v. Estate of Hicks ex rel. Brownridge*, 25 So. 3d 580, 582 (Fla. 2d DCA 2009) (same, except the specific power was "to act with respect to claims and litigation").

The courts in the preceding cases correctly interpreted the broad catch-all provisions as limited to acts necessary to effectuate the specific grants. This preferred contract interpretation properly "gives reasonable meaning to all the provisions of a contract" and leaves no provision "useless or inexplicable." *Premier*, 632 So. 2d at 1057; *see also James*, 843 So. 2d at 308 (stating that if a broad catch-all provision was construed to grant the holder unlimited power, "there would be no meaning left for [the specific power], or area for its operation.")

The third category is where the opinions of the District Courts start to go awry. The third category consists of powers of attorney that include specific grants, but also include broad unlimited grants, which by their own terms, are not restricted to the specific grants. *See, e.g.*, *Jaylene, Inc. v. Moots*, 995 So. 2d 566, 568 (Fla. 2d DCA 2008); *Five Points Health Care, Ltd. v. Mallory*, 998 So. 2d 1180, 1181 (Fla. 1st DCA 2008); and *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263, 269 (Fla. 4th DCA 2006).

In *Jaylene*, the power of attorney provided a very broad grant of authority, which stated:

> My Agent shall have full power and authority to act on my behalf. This power and authority shall authorize my Agent to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future.

*Jaylene*, 995 So. 2d at 568. In addition to the broad grant, the power of attorney listed specific grants, which included taking legal steps to collect monies owed to the principal. *Id*. Following the specific grants, the power of attorney provided that "[t]he listing of specific powers is not intended to limit or restrict the general powers granted in this Power of Attorney in any manner." *Id*. Relying on the unlimited broad grant and the provision stating the specific grants in no way limit or restrict the broad grant; the *Jaylene* court found the power of attorney to be "virtually all-inclusive." *Id*. at 569. As a result, the *Jaylene* court held that the power of attorney was broad enough to authorize the agent to consent to arbitration. *Id*.

Similarly, in *Five Points*, the power of attorney included specific grants of authority followed by an unlimited broad grant, which stated that the agent could "[d]o anything regarding my estate, property and affairs that I could do for myself." *Five Points*, 998 So. 2d at 1181. Finding the power of attorney "sufficiently similar" to the power of attorney in *Jaylene*, the *Five Points* court

held that the authority granted in the power of attorney was broad enough to confer authority upon the agent to consent to arbitration. *Id*. at 1182. The court in *Bryant* likewise looked to a broad grant of authority for its basis in holding that the power of attorney granted the agent authority to consent to arbitration. *Bryant*, 937 So. 2d at 268-69.[4]

In the preceding cases, despite the specific grants of authority within the powers of attorney, the District Courts improperly relied upon the broad grant of authority in determining whether the agent had authority to consent to arbitration. In so doing, the District Courts rendered the specific grants of authority within the powers of attorney meaningless. This is in direct contravention of the contract interpretation principle that all the provisions of the instrument should be given reasonable meaning so as to not leave any provision useless or inexplicable. *Premier*, 632 So. 2d at 1057; *First Nat'l Bank*, 18 So. at 348; *Curtiss-Wright*, 144 So. 2d at 823-24; *James*, 843 So. 2d at 308. Instead, the District Courts should have strictly construed the specific grants in determining whether the power of attorney conferred authority upon the agent, and the broad unlimited grants of authority should have been viewed as granting authority to perform acts which would be necessary to carry out the specific grants. *James*, 843 So. 2d at 308.

[4] The power of attorney in *Bryant* also included the specific power to "arbitrate … claims in favor of or against me…" *Bryant*, 937 So. 2d at 268. While acknowledging this specific grant to arbitrate claims, the *Bryant* court's main focus appears to be on the broad provision. *Id*. at 268-69.

The fourth category consists of powers of attorney that merely contain an unlimited and general broad grant of authority, such as provisions purporting to give the agent authority to do all acts that the principal can do. *See*, *e.g.*, *LTCSP-St. Petersburg, LLC v. Robinson*, 96 So. 3d 986, 987, n.2 (Fla. 2d DCA 2012) (stating power of attorney that provides a broad grant "not restricted to specific types of transactions or tasks" to be sufficient to confer authority upon agent to waive principal's constitutional rights); *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta ex rel. Huerta*, 14 So. 3d 1033, 1034 (Fla. 2d DCA 2009) (stating a power of attorney that contains an unambiguous broad general grant of authority would be sufficient to confer power upon agent to waive principal's constitutional rights); and *In re Estate of Schriver*, 441 So. 2d 1105, 1006 (Fla. 5th DCA 1983) (finding authorization "to 'execut(e) … any instrument which may be requisite … to effectuate any … thing pertaining … to me'" to be an "all-inclusive" grant allowing the donee "to do any legal act the donor could do on her own.")

While these general broad grants of authority may be sufficient in certain circumstances, such as enabling an agent to ensure a principal's access to certain services or the maintenance of the principal's affairs, they should be viewed as defective for purposes of restricting or relinquishing a principal's rights, such as a principal's constitutional right to a trial by jury and access to the courts. This is because the relinquishment of fundamental rights must be knowing and voluntary.

*De Jesus*, 848 So. 2d at 1277. In construing such a general broad grant, there would be no way to ascertain the intent of the principal or to know if the principal contemplated that its agent would have power to relinquish the fundamental rights of the principal. Further, powers of attorney should be interpreted to protect the legal rights of the principal. *Vaughn*, 633 So. 2d at 528-29; *Kotsch*, 608 So. 2d at 880-81.

Therefore, when a principal's rights are relinquished based solely upon a broad grant of authority, courts should find that the power of attorney fails in that regard, since a general broad grant cannot be construed as a knowing and voluntarily relinquishment of rights. *Cf., e.g., Bell*, 573 So. 2d at 59 (giving away property of principal as a "gift" not within broad grant of authority to agent); *Johnson v. Fraccacreta*, 348 So. 2d 570, 572 (Fla. 4th DCA 1977) (same); *Krevatas*, 518 So. 2d at 437 (same); *Vaughn*, 633 So. 2d at 527 (same); *Kotsch*, 608 So. 2d at 880 (same); *Dingle*, 59 So. 3d at 328 (same); *James*, 843 So. 2d at 308 (same); *Falls at Naples*, 603 So. 2d at 101; *Bloom*, 348 So. 2d at 653; *Him*, 89 So. 3d at 1127-28.

### *B. Smith is in Conflict with Decisions from All Other District Courts which Have Uniformly Held that Powers of Attorney are to be Strictly Construed and that Only Powers Expressly Set Forth Will Support a Finding of Authority*

The POA in the present matter falls within category three: nine specific grants concerning Ms. Smith's tangible and intangible property rights, followed by

a broad, general grant of authority. (Tab 14, Ex. A; Tab 20, p. 2). The *Smith* Panel should have strictly construed the POA and found that it only granted those powers that were specified. *Kotsch*, 608 So. 2d at 880; *Falls at Naples*, 603 So. 2d at 102; *Him*, 89 So. 3d at 1127; *Dingle*, 59 So. 3d at 328; *Krevatas*, 518 So. 2d at 437; *Bloom*, 348 So. 2d at 653; *Vaughn*, 633 So. 2d at 528; *Bell*, 573 So. 2d at 59; *Estate of Milo*, 19 So. 3d at 341; *Estate of McKibbin*, 977 So. 2d at 613. As for the broad grant within the POA, the *Smith* Panel should have found that it only granted authority to perform acts necessary to carry out the specific grants, not as an unbridled grant of authority to Ms. Horn to waive Ms. Smith's constitutional rights. *See, e.g.*, *James*, 843 So. 2d at 308.

Since the instant POA contained specific grants and a general broad grant, the general broad grant should have been interpreted in a way as to not render the specific grants meaningless. *Premier*, 632 So. 2d at 1057; *James*, 843 So. 2d at 308; *Emeritus Corp*., 95 So. 3d at 1012; *Estate of Irons*, 66 So. 3d at 399. Adhering to this longstanding principle of contract interpretation would allow each provision within the POA to have reasonable meaning and area for operation. *Id*.

The *Smith* Panel's analysis of the POA, and its conclusion that the POA granted broad authority to Ms. Horn to waive Ms. Smith's constitutional rights of trial by jury, access to courts, and due process is unsupported by the plain and

unambiguous language of the POA. The nine specific grants in the instant POA allow Ms. Horn:

- to "any and all sums of money or payments due or to become due to me; (Tab 14, Ex. A. p. 1, line 4)
- to deposit in my name in any banks . . . any and all monies collected or received; (Tab 14, Ex. A. p. 1, lines 4-5)
- to pay any and all bills; (Tab 14, Ex. A. p. 1, line 6)
- to draw checks or drafts upon any and all bank accounts; (Tab 14, Ex. A. p. 1, line 7)
- to enter any safe deposit box . . . and to remove any cash, documents or other property located therein; (Tab 14, Ex. A. p. 1, lines 7-10)
- to sell or dispose of . . . any stock . . . or shares in a mutual fund; (Tab 14, Ex. A. p. 1, lines 10-13)
- to receive the consideration money for the sale thereof; (Tab 14, Ex. A. p. 1, lines 13-14)
- to execute such transfers or assignments as shall be necessary to assign my said shares, bonds, or securities; (Tab 14, Ex. A. p. 1, lines 14-16);
- to sell and convey any and all land owned by me; (Tab 14, Ex. A. p. 1, lines 16-17).

None of the specific grants expressly specify that Ms. Horn was granted power to bind Ms. Smith to arbitration and thus waive her constitutional rights of trial by jury, access to the courts, and due process. (Tab 14, Ex. A). Nor do the

specific grants refer to Ms. Smith's *personal rights*, as each grant specifically concerns Ms. Smith's *property rights*. *Id.* Furthermore, none of the express grants refer to legal rights of Ms. Smith. *Id.*

The nine detailed specific grants of authority over Ms. Smith's property rights, when read in *pari materia* with the general broad grant makes clear that Ms. Smith did not intend to give Ms. Horn any power over her *personal rights*, much less carte blanche powers over her personal constitutional rights. *See, e.g.*, *Estate of Milo*, 19 So. 3d at 341-42 (acknowledging that the power of attorney only granted authority to the agent related to the principal's property interests and did not confer authority to waive constitutional rights). When read closely and construed strictly, as the *Smith* Panel was required to do, it is clear that the general broad grant is meant to enable Ms. Horn to fully effectuate the property transaction rights granted to her in the nine specific grants that precede it. The general broad grant only authorized Ms. Horn to do and perform all acts "to effectuate any matter or thing appertaining or belonging to me and generally to act for me in all matters affecting my business and property…." (Tab 14, Ex. A. p.1, lines 17-21). There was no comma separating the phrase "to effectuate any matter," from the remaining grant, which clearly was meant as a catch-all only insofar as the property transaction rights are concerned. (Tab 14, Ex. A).

The *Smith* Panel erred in construing the POA broadly, as opposed to strictly,

and failing to apply the broad general grant in the context of the nine specific grants. In finding the broad grant of authority sufficient to confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights, the *Smith* Panel primarily relied on *Estate of Huerta*, 14 So. 3d 1033; *Five Points*, 998 So. 2d 1180; *Jaylene*, 995 So. 2d 566; *Estate of Schriver*, 441 So. 2d 1105; and *Bryant*, 937 So. 2d 263. The powers of attorney in these cases fall into categories three and four discussed above. (*See supra* Section I(a)).

Each case relied upon by the *Smith* Panel included a power of attorney that either contained: (a) specific grants, followed by an unlimited broad grant; or (b) only an unlimited broad grant. *Jaylene*, 995 So. 2d at 568; *Five Points*, 998 So. 2d at 1181; *Bryant*, 937 So. 2d at 269; *Estate of Huerta*, 14 So. 3d at 1034; *Estate of Schriver*, 441 So. 2d at 1006. As previously stated, the District Courts in each of the preceding cases improperly relied upon the broad grant of authority in determining whether the agent had authority to relinquish its principal's fundamental rights, or in the case of the *Estate of Schriver*, an elective share. (*See supra* Section I(a)).

Where the powers of attorney also provided specific grants, as in *Jaylene*, *Five Points*, and *Bryant*, the District Courts rendered the specific grants within the powers of attorney meaningless. *Jaylene*, 995 So. 2d at 568; *Five Points*, 998 So. 2d at 1181; *Bryant*, 937 So. 2d at 269. This is exactly what the *Smith* Panel has

done in the present case. (Tab 20). This is inapposite to the interpretation principle that all the provisions of the instrument should be given reasonable meaning so as to not leave any provision useless or inexplicable. *Premier*, 632 So. 2d at 1057; *First Nat'l Bank*, 18 So. at 348; *Curtiss-Wright*, 144 So. 2d at 823-24; *James*, 843 So. 2d at 308; *Estate of Irons*, 66 So. 3d at 398-99.

The *Smith* Panel's reliance on *Estate of Huerta* and *Estate of Schriver* fares no better, as the District Courts' holdings in *Estate of Huerta* and *Estate of Schriver* directly conflict with controlling precedent, the Florida Legislature's directive, and the legal principles applicable to interpreting the proper scope of powers of attorney. The broad grants of authority in *Estate of Huerta* and *Estate of Schriver* should have been found to be defective for purposes of relinquishing or restricting the principal's rights, since a general broad grant cannot be construed as a knowing and voluntarily relinquishment of rights. *Cf.*, *e.g.*, *Bell*, 573 So. 2d at 59 (giving away property of principal as a "gift" not within broad grant of authority to agent); *Johnson v. Fraccacreta*, 348 So. 2d 570, 572 (Fla. 4th DCA 1977) (same); *Krevatas*, 518 So. 2d at 437 (same); *Vaughn*, 633 So. 2d at 527 (same); *Kotsch*, 608 So. 2d at 880 (same); *Dingle*, 59 So. 3d at 328 (same); *James*, 843 So. 2d at 308 (same); *Falls at Naples*, 603 So. 2d at 101; *Bloom*, 348 So. 2d at 653; *Him*, 89 So. 3d at 1127-28.

Florida law is clear that powers of attorney are to be strictly construed and

that only powers expressly set forth in the power of attorney will support a finding of authority. All provisions of the power of attorney must be considered in *pari materia* to ascertain the intent of the principal, and to give effect to all provisions. Construing the instant POA strictly and carefully, the *Smith* Panel should have concluded that the POA did not authorize Ms. Horn to waive Ms. Smith's constitutional rights.

Since the *Smith* Panel's opinion is in conflict with decisions from other District Courts that have uniformly held that powers of attorney are to be strictly construed and that only powers expressly set forth will support a finding of authority; this Court should disapprove of *Smith*.

### *C. Smith in in Conflict with the Legislature's Intent on the Proper Scope of Authority Granted in Powers of Attorney*

Florida's Uniform Durable Power of Attorney Statute likewise provides no support to the *Smith* Panel's conclusion that powers of attorney can be expanded by reliance upon a broad all-inclusive grant of power. The Estate respectfully suggests that § 709.08 (1998)[5] actually supports the opposite conclusion in the instant case. The portion of the statute relied upon by the *Smith* Panel reads, in pertinent part, that "[u]nless otherwise stated in the durable power of attorney, the

[5] During the pendency of this appeal, § 709.08 has been repealed by Laws 2011, c. 2011-210, § 33, eff. Oct. 1, 2011. The Florida Legislature divided § 709 into two parts with part I entitled "Powers of Appointment" and part II entitled "Powers of Attorney," which consists of newly enacted § 709.2101, *et seq*.

durable power of attorney applies to any interest in property owned by the principal, including ... all other contractual or statutory rights or elections. . . .” § 709.08(6). But § 709.08 went on to state that an attorney in fact has full authority to perform, without prior court approval, “every act authorized and **specifically enumerated** in the durable power of attorney.” § 709.08(7)(a) (1998) (emphasis added).

Furthermore, in 2011, the Florida Legislature repealed § 709.08 and created § 709.2201, entitled “Authority of agent” which states:

> (1) Except as provided in this section or other applicable law, **an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent.** Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.

§ 709.2201(1), Fla. Stat. (2011)[6] (emphasis added).

Thus, logically the converse must be true. An attorney in fact would have **no authority** to perform without prior court approval any act which is **not specifically**

[6] Florida Statute § 709.2404(2) (2011) entitled “Effect on existing powers of attorney” states “[w]ith respect to all matters other than formalities of execution, this part applies to a power of attorney regardless of the date of creation.”

**enumerated** in the power of attorney. This interpretation is entirely consistent with *Kotsch, Falls at Naples, Him, Dingle, Krevatas, Bloom, Vaughn, Bell, Estate of Milo*, and *Estate of McKibbin*, all of which authorities are in conflict with the *Smith* Panel's ruling, and each of which requires an express and specifically enumerated power to be found within the power of attorney before authority can be lawfully exercised thereunder. *Kotsch*, 608 So. 2d at 880; *Falls at Naples*, 603 So. 2d at 102; *Him*, 89 So. 3d at 1127; *Dingle*, 59 So. 3d at 328; *Krevatas*, 518 So. 2d at 437; *Bloom*, 348 So. 2d at 653; *Vaughn*, 633 So. 2d at 528; *Bell*, 573 So. 2d at 59; *Estate of Milo*, 19 So. 3d at 341; *Estate of McKibbin*, 977 So. 2d at 613.

Moreover, the Florida Legislature intended that powers of attorney be used as vehicles to protect and aid disabled and incapacitated Floridians in the handling of their affairs. *See, e.g., Estate of Schiver*, 441 So. 2d at 1106. The power of attorney statute was meant to have a beneficial effect. It is meant to help in the handling of the incapacitated person's affairs. The Florida Legislature surely did not contemplate such an unfair use of a power of attorney to deprive, rather than aid, assist and facilitate the exercise of the principal's constitutional and statutory rights.

Nonetheless, the *Smith* Panel's interpretation of the instant POA has the opposite effect of that which the Legislature sought to accomplish. Rather than benefitting or helping Ms. Smith in the handling of her property rights transactions,

the *Smith* Panel's broad interpretation of her POA harmed Ms. Smith by bestowing upon Ms. Horn the right to waive and forfeit Ms. Smith's personal constitutional rights despite that the express language of the POA contemplated no such grant of power.

Finally, the Florida Legislature enacted the Assisted Living Facilities Act (ALFA) as a remedial statute "designed to protect the residents of such facilities." *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 578 (Fla. 1st DCA 2007) *citing Bryant*, 937 So. 2d at 266 (finding ALFA "contains provisions similar to those" of the Nursing Home Resident's Right Act (NHRA)). Applying the *Smith* Panel's improper construction to the instant POA, further defeats the Legislature's intent to protect residents at such facilities, like Ms. Smith.

Since the *Smith* Panel's opinion is entirely inconsistent with the Florida Legislature's intent as evidenced in former § 709.8(6)-(7) and current § 709.2201(1), this Court should disapprove of *Smith*.

## II. Ms. Horn Did Not Have Apparent Authority to Waive Ms. Smith's Constitutional Rights

As an alternative basis for Ms. Horn's authority to consent to the arbitration agreement on behalf of Ms. Smith, Southland asserted in their Answer Brief before the Fifth District, that Ms. Horn had apparent authority to act on Ms. Smith's

behalf.[7] (Tab 18, pp. 16-18). Southland's argument regarding Ms. Horn's apparent authority is an issue which Southland improperly raised for the first time on appeal. Thus, this Court should disregard this argument if Southland attempts to raise it before this Court, as the Court is precluded from considering on appeal, an issue which was not raised or considered at the trial court level. *Sunset Harbour Condominium Association v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005); *Williams v. State*, 892 So. 2d 1185, 1187 (Fla. 5th DCA 2005). Nonetheless, even if Southland had properly raised and preserved its apparent authority argument for appellate review, it is inapplicable to the instant case.

When a party seeks to bind a nonsignatory to a contract signed by the nonsignatory's purported agent, it bears the burden of proving the authority of the agent to enter into such a contract. *Cat 'N Fiddle, Inc. v. Century Ins. Co.*, 213 So. 2d 701, 704 (Fla. 1968); *Foye Tie & Timber Co. v. Jackson*, 97 So. 517, 519 (Fla. 1923). Florida law is clear that for purposes of apparent authority, it is the intent of the principal and not the intent of the agent that matters. *Taco Bell of California v. Zappone*, 324 So. 2d 121, 123-24 (Fla. 2d DCA 1974).

An apparent agency relationship can arise when there has been: (1) a representation by the principal that the actor is his or her agent; (2) reliance on that representation by a third party; and (3) a change in position by the third party in

[7] *Smith* did not address Southland's apparent authority argument. (Tab 20).

reliance on that representation. *Stalley v. Transitional Hospitals Corp. of Tampa, Inc.*, 44 So. 3d 627, 629 (Fla. 2d DCA 2010). When there has been no representation of authority by the principal, no apparent agency relationship arises. *Stalley*, 44 So. 3d at 630.

In the present matter, Southland failed to present any evidence that: (1) Ms. Smith intended for Ms. Horn to waive Ms. Smith's constitutional rights; (2): Ms. Smith ratified Ms. Horn's action of waiving Ms. Smith's constitutional rights; or (3) Ms. Smith even knew that Ms. Horn executed an arbitration agreement waiving Ms. Smith's constitutional rights. Since Southland failed to present any evidence to establish Ms. Horn's apparent authority to consent to the arbitration agreement on Ms. Smith's behalf, its alternative argument must fails. Accordingly, this Court should find that Ms. Horn did not have apparent authority to waive Ms. Smith's constitutional rights.

## CONCLUSION

This Court's guidance is needed to bring clarity and precedence to an issue of sweeping significance to Florida's elderly residents as well as to all Florida citizens that have appointed agents to assist them in the conduct of their daily affairs. Constitutional rights cannot be unknowingly waived, and in the instant case, the POA lacks any specific power allowing Ms. Horn to waive Ms. Smith's constitutional rights.

For the foregoing reasons, the Estate respectfully requests that this Court determine that powers of attorney are to be strictly construed and only those powers which are specified will be granted to an attorney-in-fact. Accordingly, the Estate requests that this Court find that the instant POA does not confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights, reverse *Smith*, and remand the matter to the trial court with instructions to deny the Compel Motions.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent via electronic mail to: **Thomas A. Valdez, Esquire,** of Quintairos, Prieto, Wood, & Boyer, P.A., 4905 W. Laurel Street, Suite 200, Tampa, Florida 33607 at tvaldez.pleadings@qpwblaw.com; tvaldez@qpwblaw.com; and mromero@qpwblaw.com this 11th day of February, 2014.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response is printed in the Times New Roman 14-point font, and otherwise complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

*/s/ Isaac R. Ruiz-Carus*
**Isaac R. Ruiz-Carus, Esquire**